APPENDIX A

Excerpts from Chapter X of the Bankruptcy Act Corporate Reorganizations

(Act of June 22, 1938, C. 575, 52 Stat. 840)

§520. Notices

Whenever notice is to be given under this chapter, the court shall designate, if not otherwise specified hereunder, the time within which, the persons to whom, and the form and manner in which the notice shall be given. Any notice to be given under this chapter may be combined, whenever feasible, with any other notice or notices to be given under this chapter. July 1, 1898, c. 541, §120 as added June 22, 1938, c. 575, §1, 52 Stat. 885.

§569. Preparation, filing, and hearing on plan; trustee appointed

Where a trustee has been appointed the judge shall fix a time within which the trustee shall prepare and file a plan, or a report of his reasons why a plan cannot be effected, and shall fix a subsequent time for a hearing on such plan or report and for the consideration of any objections which may be made or of such amendments or plans as may be proposed by the debtor or by any creditor or stockholder. July 1, 1898, c. 541, §169, as added June 22, 1938, c. 575, §1, 52 Stat. 890.

§571. Notice and time of hearing on plan

Notice of the time of any hearing, as provided in section 569 or section 570 of this title, shall be given to the debtor, the creditors and stockholders, the indenture trustees, the Secretary of the Treasury, the Securities and Exchange Commission, and such other persons as the court may designate. The judge may, upon the application of the trus-

tee, any creditor, indenture trustee, or stockholder, advance the time of such hearing. July 1, 1898, c. 541, §171, as added June 22, 1938, c. 575, §1, 52 Stat. 890.

§574. Entry of order and fixing time for acceptance of plan

After the hearing, as provided in section 569 or section 570 of this title, and, if a plan has been submitted to the Securities and Exchange Commission, as provided in section 572 of this title, then after the filing of the report or notice that it will not be filed, or after the expiration of the time for its filing, whichever first occurs, the judge shall enter an order approving the plan or plans which in his opinion comply with the provisions of section 616 of this title, and which are fair and equitable, and feasible, and shall fix a time within which the creditors and stockholders affected thereby may accept the same. July 1, 1898, c. 541, §174, as added June 22, 1938, c. 575, §1, 52 Stat. 891.

§579. Acceptance of plan; hearing for confirmation

After a plan has been accepted in writing, filed in court, by or on behalf of creditors holding two-thirds in amount of the claims filed and allowed of each class, and, if the debtor has not been found to be insolvent, by or on behalf of stockholders holding the majority of stock, of which proofs have been filed and allowed, of each class, exclusive of creditors or stockholders or of any class of them who are not affected by the plan or whose claims or stock are disqualified pursuant to section 603 of this title, or for whom payment or protection has been provided as prescribed in paragraphs (7) and (8) of section 616 of this title, the judge shall fix a hearing, upon notice to the debtor, creditors, stockholders, indenture trustees, the Secretary of the Treasury, the Securities and Exchange Commission, and such other persons as the judge may designate, for the consideration of the confirmation of the plan

and of such objections as may be made to the confirmation. July 1, 1898, c. 541, §179, as added June 22, 1938, c. 575, §1, 52 Stat. 892.

§596. Filing and allowing proofs of claims; objections to allowances

After the approval of the petition the judge shall prescribe the manner in which and fix a time within which the proofs of claim of creditors and of the interests of stockholders may be filed and allowed. Objections by any party in interest to the allowance of any such claims or interests shall be heard and summarily determined by the court. July 1, 1898, c. 541, §196, as added June 22, 1938, c. 575, §1, 52 Stat. 893.

§597. Classification of creditors and stockholders

For the purposes of the plan and its acceptance, the judge shall fix the division of creditors and stockholders into classes according to the nature of their respective claims and stock. For the purposes of such classification, the judge shall, if necessary, upon the application of the trustee, the debtor, any creditor, or an indenture trustee, fix a hearing upon notice to the holders of secured claims, the debtor, the trustee, and such other persons as the judge may designate, to determine summarily the value of the security and classify as unsecured the amount in excess of such value. July 1, 1898, c. 541, §197, as added June 22, 1938, c. 575, §1, 52 Stat. 893.

§598. Claims by indenture trustee for all holders under trust

An indenture trustee may file claims for all holders, known or unknown, of securities issued pursuant to the instrument under which he is trustee, who have not filed claims: *Provided, however,* That in computing the majority necessary for the acceptance of the plan only the claims

filed by the holders thereof, and allowed, shall be included. July 1, 1898, c. 541, §198, as added June 22, 1938, c. 575, §1, 52 Stat. 893.

§603. Disqualification of votes on acceptance in absence of good faith

If the acceptance or failure to accept a plan by the holder of any claim or stock is not in good faith, in the light of or irrespective of the time of acquisition thereof, the judge may, after hearing upon notice, direct that such claim or stock be disqualified for the purpose of determining the requisite majority for the acceptance of a plan. July 1, 1898, c. 541, §203, as added June 22, 1938, c. 575, §1, 52 Stat. 894.

§616. Provisions of plan

A plan of reorganization under this chapter—

* * *

(7) shall provide for any class of creditors which is affected by and does not accept the plan by the two-thirds majority in amount required under this chapter, adequate protection for the realization by them of the value of their claims against the property dealt with by the plan and affected by such claims, either as provided in the plan or in the order confirming the plan, (a) by the transfer or sale, or by the retention by the debtor, of such property subject to such claims; or (b) by a sale of such property free of such claims, at not less than a fair upset price, and the transfer of such claims to the proceeds of such sale; or (c) by appraisal and payment in cash of the value of such claims; or (d) by such method as will, under and consistent with the circumstances of the particular case, equitably and fairly provide such protection.

§621. Confirmation by court

The judge shall confirm a plan if satisfied that—

(1) The provisions of subchapter VII, section 599, and subchapter X of this chapter have been complied with;

(2) the plan is fair and equitable, and feasible;

(3) the proposal of the plan and its acceptance are in good faith and have not been made or procured by means or promises forbidden by this title;

(4) all payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the plan or by any other person, for services and for costs and expenses in, or in connection with, the proceeding or in connection with the plan and incident to the reorganization, have been fully disclosed to the judge, and are reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge; and

(5) the identity, qualifications, and affiliations of the persons who are to be directors or officers, or voting trustees, if any, upon the consummation of the plan, have been fully disclosed, and that the appointment of such persons to such offices, or their continuance therein, is equitable, compatible with the interests of the creditors and stockholders and consistent with public policy. July 1, 1898, c. 541, §221, as added June 22, 1938, c. 575, §1, 52 Stat. 897.

EXCERPTS FROM SEC. 77B OF THE BANKRUPTCY ACT (ACT OF JUNE 7, 1934, C. 424, 48 STAT. 912—SUPERSEDED BY CHANDLER ACT, CHAPTER X, C. 575, 52 STAT. 840).

"(c) Upon approving the petition or answer or at any time thereafter, the judge, in addition to the jurisdiction and powers elsewhere in this section conferred upon him

* * *

(6) shall determine a reasonable time within which the claims and interests of creditors and stockholders may be

filed or evidenced and after which no such claim or interest may participate in any plan, except on order for cause shown, the manner in which such claims and interests may be filed or evidenced and allowed, and for the purposes of the plan and its acceptance, the division of creditors and stockholders into classes according to the nature of their respective claims and interests; and may, for the purposes of such classification, classify as an unsecured claim, the amount of any secured claim in excess of the value of the security therefor, such value to be determined in accordance with the provisions of section 57, clause (h), of this Act;

(7) shall cause reasonable notice of such determination and of all hearings for the consideration of any proposed plan, or of the dismissal of the proceedings, or the liquidation of the estate, or the allowance of fees or expenses, to be given creditors and stockholders by publication or otherwise;

* * *

"(e) (1) A plan of reorganization shall not be confirmed until it has been accepted in writing (whether before or after the filing of the petition or answer under this section) and such acceptance shall have been filed in the proceeding by or on behalf of creditors holding two-thirds in amount of the claims of each class whose claims have been allowed and would be affected by the plan and by or on behalf of stockholders of the debtor holding a majority of the stock of each class: Provided, however, That such acceptance shall not be requisite to the confirmation of the plan by any creditor or class of creditors (a) whose claims are not affected by the plan, or (b) if the plan makes provision for the payment of their claims in cash in full, or (c) if provision is made in the plan for the protection of the interests, claims, or liens of such creditor or class of creditors in the manner provided in subdivision (b),

clause (5), of this section: And provided further, That such acceptance shall not be requisite to the confirmation of the plan by any stockholder or class of stockholders (1) if the judge shall have determined either that the debtor is insolvent, or that the interests of such stockholder or stockholders will not be affected by the plan, or (2) if provision is made in the plan for the protection of the interests of such stockholder or class of stockholders in the manner provided in subdivision (b), clause (4), of this section. With such acceptance there shall be set forth, verified in such manner as the judge shall require, what, if any, contracts of the debtor are executory in whole or in part, and what unexpired leases have been rejected and surrendered.

* * *

"(f) After hearing such objections as may be made to the plan, the judge shall confirm the plan if satisfied that (1) it is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders, and is feasible; (2) it complies with the provisions of subdivision (b) of this section; (3) it has been accepted as required by the provisions of subdivision (e), clause (1) of this section; * * *"

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 181—October Term, 1956.

(Argued November 8, 1956 Decided November 30, 1956.)

Docket No. 24362

In the Matters

of

THIRD AVENUE TRANSIT CORPORATION, *et al.*,

Debtors.

A. PHILIP WOOLFSON,

Appellant,

vs.

LESTER T. DOYLE, As Trustee in Reorganization, *et al.*,

Appellees.

Before:

MEDINA, LUMBARD and WATERMAN,

Circuit Judges.

Appeals from orders of the United States District Court for the Southern District of New York, Edward J. Dimock, Judge.

Appellant, claiming to be a stockholder and creditor of Third Avenue Transit Corporation, appeals from three

separate orders, approving a plan of reorganization, confirming the plan, and denying a motion to set aside an order finding the debtor insolvent. Not reported below. Affirmed.

A. Philip Woolfson, Attorney Pro Se, New York City.

Saxe, Bacon & O'Shea, New York City (William J. O'Shea, John A. Kiser and Martin Fogelman, New York City, of Counsel), for Lester T. Doyle, Trustee in Reorganization.

Thomas G. Meeker, General Counsel, David Ferber, Assistant General Counsel, Washington, D. C. (Richard V. Bandler, Attorney, New York City, of Counsel), for Securities and Exchange Commission.

Kelley, Drye, Newhall & Maginnes, New York City (Frank H. Heiss, New York City, of Counsel), for The Hanover Bank, Indenture Trustee under the First Refunding Mortgage.

Wagner, Quillinan & Tennant, New York City (Sidney R. Nussenfeld, New York City, of Counsel), for Colonial Trust Company as Successor Trustee under the Adjustment Mortgage.

Peter Campbell Brown, Corporation Counsel, New York City (Sidney Brandes, New York City, of Counsel), for the City of New York.

Shearman & Sterling & Wright, New York City (Grayson M-P Murphy and Thomas R. Nangle, New York City, of Counsel), for Fifth Avenue Coach Lines, Inc.

Murphy, Block, Sullivan & Sawyer, New York City (John Dwight Sullivan, New York City, of Counsel), for O'Connell Committee for First Refunding Bondholders.

HAROLD P. SELIGSON and MORTON E. YOHALEM, New York City (Morton E. Yohalem, New York City, of Counsel), for Amott Committee for First Refunding Bondholders.

CHARLES POLETTI, HOFFMAN, BUCHWALD, NADEL & HOFFMAN and BUCHMAN & MUCHMAN, New York City (Charles D. Hoffman, New York City, of Counsel), for Imperial Bank of Canada, et al., Adjustment Income Bondholders.

KRESEL & MEYERSON, New York City (Samuel Meyerson, New York City, of Counsel), for Tinker Committee for Adjustment Bondholders.

BERGERMAN & HOURWICH, New York City (Joseph Calderon, New York City, of Counsel), for Smith Committee for Adjustment Bondholders.

HAYS, ST. JOHN, ABRAMSON & HEILBRON, New York City (Edward M. Garlock and Osmond K. Fraenkel, New York City, of Counsel), for Petitioning Creditors.

MEDINA, Circuit Judge:

A corporate reorganization of Third Avenue Transit Corporation was commenced by the filing of an involuntary petition in the District Court for the Southern District of New York on October 25, 1948. Various plans of reorganization were formulated and amended or modified. After numerous and prolonged hearings and consideration by the Securities and Exchange Commission and the Public Service Commission of the State of New York, a Joint Plan of Reorganization was finally evolved. This Plan was duly approved by the District Court; but, before the confirmation of the Plan, appellant, an alleged holder of common stock and at least one of the Adjustment Income Mortgage Bonds of the debtor, appeared on the scene

and made a series of motions to block the consummation of the Plan.

The matter came before us on the motion calendar on November 8, 1956, when appellees moved to dismiss the appeals, hereinafter described, as frivolous. As appellant's points were numerous, we proceeded, with the consent of all parties, to hear the appeals on the merits forthwith, an oral argument and on the briefs then and later submitted.

There are three appeals:

(1) From an order of September 11, 1956, denying appellant's motion to vacate an order of August 5, 1955, adjudging the debtor to be insolvent and to reopen the question of solvency for further consideration;

(2) From an order of July 26, 1956, approving the Joint Plan to Reorganization;

(3) From an order of October 8, 1956, confirming the Joint Plan of Reorganization.

Despite the unsubstantial and technical character of the miscellany of points urged upon us as ground for reversal, we have given each of them careful consideration. There is not a shred of merit in any of them.

I.

The insolvency of the debtor is abundantly established as of the date of the order of adjudication and long prior thereto. But appellant insists that the failure of the Court to require notice to the stockholders that his order had been entered "deprived them of the right to appeal," and that "since the requirements of due process were not complied with by the Appellees, the order of the District Court of August 5, 1955 with respect to debtor's insolvency should

be set aside." We fail to understand how anyone was in any sense "deprived" of the right to appeal, unless appellant is contending that the stockholders had received no notice that such an order might be entered. But the stockholders had been apprised of this likelihood in several ways. As recently as June 28, 1955, which was shortly before entry of the order complained of, notices had been mailed reminding them that under the trustee's plan "No provision is made for the stockholders of debtor Third Avenue since the assets of that debtor are insufficient to pay its creditors in full." The notice announced the time and place of the resumption of the hearings and stated, "Any creditor or stockholder has the right to appear in person or by duly authorized representative at the hearing and make objections or purpose amendments to the Trustee's Amended Plan of Reorganization, or propose another plan or plans of reorganization." This disposes of appellant's appeal No. 1.

II.

Appellant contends that the District Court lacked power to enter its order approving the plan because of failure to comply with the requirement of Section 171 of the Bankruptcy Act (11 U. S. C. Section 571) that "Notice of the time of any hearing, as provided in Section 169 * * * shall be given to * * * the creditors and stockholders * * *" Section 169 (11 U. S. C. Section 569) provides:

> "Where a trustee has been appointed the judge shall fix a time within which the trustee shall prepare and file a plan, or a report of his reasons why a plan cannot be effected, and shall fix a subsequent time for a hearing on such plan or report and for the consideration of any objections which may be made or of such amendments or plans as may be proposed by the debtor or by any creditor or stockholder."

It is not disputed that there was notice of the commencement of hearings following submission of the original plan by the trustee, as well as additional notices preceding approval of the plan. Appellant's position seems to be that further notice is required by the Act. We find no such requirement. On the contrary, if separate notice were required as a condition precedent to the consideration of every amendment or modification or to resumption of the hearings following a recess, it is plain that any party so minded could delay the proceeding indefinitely and cause needless and prohibitive expense.

The statute contemplates a continuous process which may culminate in the approval of a fair and equitable and feasible plan, initiated by the filing of the trustee's plan with widespread notice of the commencement of hearings. Creditors and stockholders and other interested persons have the right to be heard and to object or to propose amendments or modifications and even to file completely new plans. The notices of plan hearings uniformly state, as did the notice in this case, that the hearings may be adjourned from time to time without further notice other than the announcement of such adjournment in open court.

Appellant also contends that before approving the Plan the Court should have ordered notice by publication as well as notice by mail. He points to no authority to support this contention. Section 207 of the Act (11 U. S. C. Section 607) provides that, "Except where otherwise provided in this chapter, the judge may from time to time enter orders designating * * * the form and manner in which notice may be given," and Section 120 (11 U. S. C. Section 520) provides that, "Whenever notice is to be given under this chapter, the court shall designate, if not otherwise specified hereunder, * * * the form and manner in which such notice shall be given."

The objections urged by appellant do not establish failure to comply with Section 171.

Appellant also challenges the District Court's approval of the plan on the ground that the Court need not have submitted the plan to the New York State Public Service Commission under Section 178 (11 U. S. C. Section 578) since that body lacks jurisdiction to establish rates for the debtor corporation. Even if this were true, we fail to see how appellant could have been injured by such submission.

III.

In his third appeal, appellant urges that the order confirming the plan is invalid because of failure to comply with Section 179 (11 U. S. C. Section 579), which requires acceptance "by or on behalf of creditors holding two-thirds in amount of the claims filed and allowed in each class." The undisputed facts are that some 84 per cent in amount of the holders of the adjustment mortgage income bonds who filed claims accepted the plan, but that these assenting bondholders represented less than two-thirds of the total issue. The question is simply whether acceptance by the holders of two-thirds of the entire issue is required or only by the holders of two-thirds of the amount claimed and allowed. The statute is explicit on the point, and we find little to recommend appellant's argument that it would be "ridiculous" to construe the statute as meaning what it says since acceptance by the holders of only a tiny fraction of the issue would be sufficient where only a few claims are filed. We think it not unreasonable to provide that if only a few creditors are available and interested enough to vote, they should determine acceptance or rejection of the Plan by their class. In any event, we are not at liberty to vary the requirement of the Act. And if Section 179 were thought to leave any doubt as to what that requirement is, such doubt would be dispelled by Section 198 (11 U. S. C. Section 598), which provides:

> "An indenture trustee may file claims for all holders, known or unknown, of securities issued pursuant to the instrument under which he is trustee, who have not filed claims: Provided, however, That in computing the majority necessary for the acceptance of the plan only the claims filed by the holders thereof, and allowed, shall be included."

This section also disposes of appellant's contention that for purposes of determining the class, the acceptance of two-thirds of which was necessary, "it was clearly erroneous for the District Court Judge to require the Adjustment Bondholders individually to file proofs of claim."

Appellant's remaining points are frivolous on their fact, and we shall not discuss them.

The orders appealed from are affirmed.

APPENDIX C

In re KENILWORTH BLDG. CORPORATION,
KROESCHELL et al. v. BRITTAIN et al.

No. 6852.

Circuit Court of Appeals, Seventh Circuit.

July 14, 1939.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division; John P. Barnes, Judge.

Proceeding in the matter of the reorganization of the Kenilworth Building Corporation, debtor, wherein an amended reorganization plan was submitted by Joseph K. Brittain and others, as bondholders' committee. From a decree confirming the plan of reorganization, Roy Kroeschell and others appeal.

Reversed and remanded, with directions to set aside decree of confirmation and for further proceedings in accordance with opinion.

J. Kentner Elliott, of Chicago, Ill., for appellants.

Frederick Z. Marx and Joseph D. Lawyer, both of Chicago, Ill., for appellees.

Before EVANS, TREANOR, and KERNER, Circuit Judges.

TREANOR, Circuit Judge.

This is an appeal from a decree of the District Court confirming a plan of reorganization. The proceeding below was an involuntary one filed pursuant to Section 77B of the Bankruptcy Act,[1] the appellees being bondholders

[1] 11 U. S. C. A. §207.

and the petitioning creditors. The bonds were in default and foreclosure proceedings were pending in an Illinois state court at the date of the institution of reorganization proceedings.

The petition for reorganization was approved on June 14, 1938, as properly filed; and on July 15, 1938, the court, by order, fixed August 25, 1938 as a final date for the filing of claims of creditors. The order further provided that unless filed within such time no claim "may participate in any plan of reorganization herein, except on order of court for cause shown." It was further ordered that the trustee under the mortgage trust deed be authorized "to file a claim in this cause not only on behalf of said trustee under said trust deed individually but also on behalf of the holders of the bonds." Notice was thereafter issued to creditors, stockholders and claimants stating that the trustee was authorized to file a claim on behalf of the holders of the bonds.

In accordance with the foregoing the trustee filed a timely claim for the entire bond issue in the principal sum of $112,000; and this claim was allowed subject to deduction pro tanto for any duplicating claims which should be filed by individual bondholders.

Creditors holding bonds in the amount of approximately $30,000 and a bondholders' committee representing deposited bonds in the amount of $62,600 each proposed a plan. Both plans provided for the creation of a new corporation to acquire the debtor's assets and to issue shares in exchange for outstanding obligations of the debtor. The plans differed only in the following feature: The committee's plan provided that the shares should be issued to three trustees appointed by the court and held in trust for a period of ten years, such trust arrangement being subject to termination by 51% of the creditors. The court directed that only the committee's plan be submitted to the creditors for consideration, and upon submission sufficient creditors

filed dissents and objections to prevent confirmation of the plan.

The District Court was advised by counsel that the rejection of the plan was due to the antipathy of the creditors to the trust arrangement; but the court thereafter repeatedly informed counsel that no plan which did not include control through a trust arrangement for a definite term, subject to termination only by the court, would receive the confirmation of the court. Further, the court stated that it would not approve the committee's plan, which had been rejected by the creditors, because it provided for termination of the trust by a vote of a majority of the creditors. Thereafter, the bondholders' committee proposed an amended plan of reorganization from which was omitted the provision authorizing termination of the trust by a vote of 51% of the creditors. The court ordered this plan to be filed and submitted to creditors.

In connection with the submission of the plan the court approved a communication to all of the creditors which stated in substance that the court would not approve any plan differing from the submitted plan; that the court would dismiss the proceedings unless such plan was accepted; and that if so dismissed the time and expenses incurred would be lost and jurisdiction revert to foreclosure proceedings. The communication contained the following statement: "The failure to execute and forward to the clerk of the court a written acceptance of the plan of reorganization is equivalent to a vote against the confirmation of the amended plan * * * This communication is being sent to you by authority of the court and it has been submitted to and approved by the judge before whom the case is now pending." The court entered two orders, the first of which authorized the committee to send the communication and a copy of the plan to bondholders *who had deposited their bonds with the committee*, and the second order provided that the committee should print copies of

the communication and deliver them to the debtor and that the debtor should "cause *to be sent by mail to the creditors* * * * (*other than the depositing first mortgage bondholders*) a copy of said communication which shall be inclosed with the plan of reorganization * * *" (our italics).

After a hearing on confirmation of the committee's amended plan, the plan was confirmed despite the fact that consents to the plan represented only $47,800 worth of claims out of a total of $112,000 on the outstanding bond issue. The total consents to the plan fell far short of representing two-thirds of the claims filed and allowed if the claims filed by the trustee under the trust deed securing the bondholders are taken into consideration in the computation. The District Court, however, disregarded all the claims filed by the trustee and allowed by the court and considered only the claims filed by the bondholders' committee or by the individual claimants.

In support of the foregoing action the court ruled, and appellees contend, that Section 198 of the Chandler Act[2] is applicable and requires that the claims filed only by the trustee must be disregarded. The District Court also made a finding "that under the old practice, the trustee would not be entitled to vote or his claim would not be counted."

[1-3] We are of the opinion that under Sec. 77B the total amount of claims, two-thirds of which must be represented by assenting creditors, includes the claims filed by an indenture trustee which are allowed. The language of Sec. 77B is definite and unambiguous and makes it mandatory that written acceptances be filed by or on behalf of the creditors holding two-thirds in amount of the claims allowed.[3] Perhaps we should emphasize that the act requires an affirmative expression of acceptance but does not require a dissent. The necessary meaning is that if creditors hold-

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[2] 52 Stat. 893, 11 U. S. C. A. §598.

[3] 11 U. S. C. A. §207 (e) (1); 11 U. S. C. A. §207 (f) (3).

ing more than one-third in amount of the claims allowed do not cause written acceptances to be filed the plan cannot be lawfully confirmed. The evident purpose of the provision is to insure that any plan which is adopted will have the advantage of the affirmative approval and support of creditors holding at least two-thirds in amount of claims allowed. For the purpose of filing written acceptances no distinction is made between claims filed by an indenture trustee and allowed and claims filed by individual creditors or by someone expressly authorized to file for them. The only restriction placed upon claims is that they be claims of creditors and that they be allowed. If a claim has been filed and allowed nothing in the act authorizes the striking of such claim from the amount of claims to be considered for purposes of acceptance of the plan. In short, the total amount of all claims which have been allowed constitutes the amount of claims, two-thirds of which must be voted for acceptance. In the instant case the trustee was expressly authorized to file a claim on behalf of all bondholders, the amount of the claim being subject to reduction pro tanto by subsequent filings of bondholders' committee or individual creditors. The trustee's claim was allowed and such allowance has not been expunged. The total amount of claims allowed was $112,000.

[4, 5] It does not follow from the foregoing that under Sec. 77B an indenture trustee has implied authority to file written acceptances. Since the language of Sec. 77B expressly requires that written acceptances be filed by or on behalf of creditors holding two-thirds in amount of the claims allowed, we think the reasonable construction is that anyone filing written acceptances on behalf of creditors must be specially authorized. But the relationship and duty of the indenture trustee to the bondholders is such that he would have implied authority to file claims for them even in the absence of a special authorization in the deed of trust. The court recognized the existence of this

authority by authorizing the trustee to file claims for the bondholders subject to the right of the bondholders to withdraw his authority by filing their own claims or by expressly authorizing someone else to do so. The relationship and duty of the indenture trustee to the bondholders would not imply authority to bind these bondholders to an acceptance of a particular plan of reorganization.

We conclude that Sec. 77B requires the claims filed by the indenture trustee and allowed to be considered in determining the amount of the claims, two-thirds of which had to be represented by creditors assenting to the plan.

The finding of the District Court to the effect that under the old practice the claim filed by the trustee and allowed "would not be counted" is without effect in view of our construction of the language of Sec. 77B. Furthermore, no evidence appears in the record to support such a finding and apparently the only specific reference to the old practice is found in a statement of counsel for the bondholders' committee during the hearing on confirmation. The following is quoted from his statement: "Under 77B, there was no express provision authorizing the trustee to file a claim for the benefit of all outstanding bonds, but the trustees almost universally did so, and 77B provided it was necessary to have the affirmative acceptance of two-thirds of the claims allowed. There was no provision therein expressly providing the claim of the trustee was not to be taken into consideration in determining the two-thirds. However, in order to play safe, we always in those cases got two-thirds of the entire issue."

The Chandler Act, Section 276 (c)[4] provides generally that Section 77B shall continue in force as to proceedings thereunder pending at the effective date of the Chandler Act; but Section 276 (c) (2) provides as an exception to

[4] 52 Stat. 905, 11 U. S. C. A. §676.

section 276 (c) that "if the petition in such proceedings was approved more than three months before the effective date of this amendatory Act, the provisions of this chapter shall apply to such proceedings to the extent that the judge shall deem their application practicable * * *." The The petition in the instant case was approved more than three months before the effective date of the amendatory act. The District Court ruled that the application of Section 198 of the Chandler Act was practicable. This Section reads as follows: "An indenture trustee may file claims for all holders, known or unknown, of securities issued pursuant to the instrument under which he is trustee, who have not filed claims: Provided, however, That in computing the majority necessary for the acceptance of the plan only the claims filed by the holders thereof, and allowed, shall be included." The District Court held that under this provision only the claims filed by the holders, or by the committee, and allowed, should be considered.

[6, 7] Granting that the District Court correctly construed Section 198 of the Chandler Act, we are of the opinion that the application of Section 198 is not practicable in view of the rulings of the court in the course of the reorganization proceedings prior to the submission of the plan, and especially in view of the understanding which the bondholder-creditors must have had. It is first necessary to consider the meaning of "practicable" as used in Section 276 (c) (2) of the Chandler Act. The Circuit Court of Appeals for the Third Circuit construes the word "practicable as follows:[5] "Practicable * * * is not synonymous with possible, but means feasible, fair and convenient." In view of what had transpired prior to the ruling of the court at the time of the report on acceptances, it was not "feasible, fair and convenient" to apply Section 198. Up

[5] *In re Philadelphia & Reading Coal & Iron Co.*, 3 Cir., 104 F. 2d 126, 127.

to that time the conduct of the proceedings in respect to the adoption of the plan obviously was on the assumption that all claims filed and allowed had to be considered in determining whether creditors holding two-thirds in amount of claims allowed were in favor of acceptance.

The court's order of July 15, 1938 fixed the time limit for the filing of claims and provided that unless claims were filed within such time no claim "may participate in any plan of reorganization herein, except an order of court for cause shown." At the same time the court also ordered that the trustee under the Mortgage Trust Deed securing the bondholders was authorized "to file a claim in this cause not only on behalf of said trustee * * * individually but also on behalf of the holders of the bonds." Notice was thereafter issued to creditors, stockholders and claimants stating that the trustee was authorized to file a claim "on behalf of the holders of the bonds." When the plan which was confirmed by the court was submitted to the creditors for acceptance it was accompanied by a communication which contained the statement that "failure to execute and forward to the clerk of the court a written acceptance of the plan of reorganization is equivalent to a vote against the confirmation of the amended plan." The court entered an order authorizing the bondholders' committee to send the communication and a copy of the plan to bondholders who had deposited their bonds with the committee, and also provided that the committee should print copies of the communication and deliver them to the debtor and that the debtor should "cause to be sent by mail to the creditors and stockholders of and claimants against said debtor and any of its property (other than the depositing first mortgage bondholders) * * * a copy of said communication, which shall be inclosed with the plan of reorganization." The record shows that when the original plan of the bondholders' committee was submitted "dissents from and

objections to the plan of the reorganization were filed by the holders of a sufficient amount of bonds and certificates of deposit to prevent approval of the plan as submitted." Apparently holders of bonds generally, as well as holders of certificates of deposit with the committee, were treated as creditors who were entitled to file written acceptances of the plan. There is no indication that any holder of a bond whose claim had been filed by the indenture trustee and allowed had any reason to believe that it was necessary for him to refile his claim in order for his claim to be counted for purposes of acceptance, as a part of the total claims.

In view of the situation it was not "practicable" to apply Section 198 of the Chandler Act which, if correctly construed by the District Court, presupposes that all bondholders whose indenture trustee has filed claims will understand that it is necessary to refile their claims, and will have an opportunity to refile them, in order to have their claims taken into consideration in computing the majority necessary for the acceptance of the plan. In order for Section 198 to be "practicable" in any substantial and real sense it would have been necessary for the District Court to have set aside its order limiting the time for the filing of claims and to have afforded holders of bonds an opportunity to refile their claims for allowance with the understanding that such action was necessary in order to entitle their claims to be taken into consideration in the computation of the total amount of claims, of which two-thirds in amount must be represented by creditors who file written acceptances.

It would not be practicable to apply a provision of the Chandler Act if it authorizes confirmation of a proposed plan in case the plan is approved by creditors holding two-thirds in amount of about $74,000 of claims when the reorganization proceeding had been conducted on the assumption, and upon the understanding of all interested

parties, that the proposed plan could not be confirmed by the court unless it should be approved by the holders of two-thirds in amount of $112,000. The application of the section of the Chandler Act brought about a result which, upon the basis of the written acceptances, it was impossible to attain under Section 77B; and since it was not invoked until after the plan had been submitted to holders of claims and until it was too late for holders of claims which had been filed by the indenture trustee to refile their claims, the result was to prevent their participation in the consideration of the plan. The application of Section 198 at the stage of the proceedings at which it was invoked could be construed "practicable" only in the sense that it afforded a strictly formal procedural means to secure acceptance of the plan. But in view of the stage of progress in the reorganization proceedings the application was impracticable in any substantial sense since it could not be said to be adapted to the effectuation of the true purposes of the reorganization proceeding.

We hold that the District Court's decree of confirmation of the plan of reorganization must be reversed and the cause remanded with directions to the District Court to set aside its decree of confirmation and for further proceedings not inconsistent with this opinion.

Decree reversed.